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RUEHSW/AMEMBASSY BERN PRIORITY 0172
RUEHAD/AMEMBASSY ABU DHABI PRIORITY 0138
RUEHKL/AMEMBASSY KUALA LUMPUR PRIORITY 0114
RHEBAAA/DEPT OF ENERGY WASHINGTON DC PRIORITY
RUEHUNV/USMISSION UNVIE VIENNA PRIORITY 0187
RUEAWJA/DEPT OF JUSTICE WASHDC PRIORITY
RHEHNSC/NSC WASHDC PRIORITY
RUEAIIA/CIA WASHINGTON DC PRIORITY
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C O N F I D E N T I A L SECTION 01 OF 03 PRETORIA 001933

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DEPT FOR P, T, ISN/CPI, AF/S

E.O. 12958: DECL: 05/28/2017

TAGS: PARM MNUC PREL KNNP SF

SUBJECT: AQ KHAN TRIAL: JUDGE NIXES BLANKET IN CAMERA ORDER, INVITES INDIVIDUAL APPLICATIONS

REF: A. PRETORIA 1853 AND PREVIOUS

B. KAY/TABLER-STONE EMAIL OF 05-25-2007

Classified By: Deputy Chief of Mission Don Teitelbaum. Reasons 1.4(b) and (d).

Summary and Introduction

¶1. (C) The State's application that extensive portions of the A.Q. Khan prosecution be conducted in camera was dismissed by the Pretoria High Court on May 25th, on the grounds that the principle of open justice requires closed court proceedings to be the exception rather than the rule and that the State had not presented sufficiently detailed evidence to justify making so extensive an exception. However, Judge Labuschagne recognized the applicable domestic and international non-proliferation obligations and the fact that "the court will have to be cleared at certain stages." He invited the State to submit more detailed in camera applications on a case-by-case basis throughout the trial and indicated the individual applications themselves could be heard in camera, if needed. While the intervening parties have won their battle of principle, it appears the State could still get exactly the protections it wants if it is willing and able to take on the associated workload.

The Ruling

¶2. (C) On May 25th, Pretoria High Court Judge Joop Labuschagne dismissed the State's application (Ref A) requesting that for seven of the ten counts in the indictment of Daniel Geiges, Gerhard Wisser and their company Krisch Engineering, court proceedings be held in camera. Specifically, the State requested that all members of the public and the media be excluded from these proceedings, that identities of expert witnesses be protected, and that access to the trial transcript and to all physical and documentary evidence be restricted. Full text of the judge's 36-page ruling has been emailed to the Department (Ref B). Highlights are as follows:

-- The ruling confirms that the accused "acquiesce in the State's application for a partial hearing behind closed doors".

-- The ruling summarizes the body of domestic and international law defining South Africa's nonproliferation obligations as laid out by the State, including: the Treaty on Non-Proliferation of Nuclear Weapons (NPT); South Africa's 1991 IAEA Safeguards Agreement; the Pelindaba Treaty (providing for an African Nuclear Weapon-Free Zone); the IAEA Trigger List and associated guidelines; the IAEA Dual-Use List and associated guidelines; UNSCR 1540; South Africa's Nuclear Act and related Trigger Lists; and, South Africa's Non-Proliferation Act and related Dual-Use Lists.

-- The ruling confirms that, under the provisions of the Nuclear Energy Act, the Non-Proliferation Act, and the Criminal Procedure Act cited by the State, "It is clear...the court has, in certain circumstances, a discretion to direct that proceedings should be held in camera which discretion must be exercised judicially."

-- The ruling finds that the intervening parties have standing to challenge the State's in camera application under Sections 16(1)(a) and (b) of the Constitution (right to freedom of expression).

-- The ruling summarizes the South African case law cited by the intervening parties and concludes that: "It therefore seems clear the Constitution...requires courts to observe the principal of open justice in the conduct of their proceedings;...recognizes the central role of the media, in

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particular, in ensuring open justice; and...permits only the narrowest demonstrably justifiable infringement of the right of access to open court proceedings."

-- The ruling also cites relevant Canadian case law, quoting the Canadian Supreme Court decision in *Toronto Star Newspapers v Ontario* (2005) that "Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted. Competing claims related to court proceedings necessarily involved an exercise in judicial discretion. It is now well-established that court proceedings are presumptively 'open' in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would subvert the ends of justice or unduly impair its proper administration."

-- The ruling finds that the intervening parties "do not seriously challenge" the evidence provided in the Tillwick, Tobey, and Minty affidavits.

-- The ruling notes that the State's replying affidavit from Naude makes two important concessions: that certain non-sensitive information and evidence is interwoven with the sensitive information and evidence in question; and, that it would be possible at some stage for the court to disclose such non-sensitive evidence, with appropriate editing. It views these concessions as supporting the intervening parties' argument that the State's requested blanket order is overly broad and that "there was no attempt whatsoever in the founding papers to analyse proposed evidence into sensitive and non-sensitive categories."

-- The ruling observes that it is unclear from the evidence presented to date whether police officers' testimony regarding their seizure of sensitive evidence meets the threshold for in camera protections.

-- The ruling finds that the State's evidence to date

supporting the need to protect witness identities does not document that "the non-disclosure of such information is a requirement of the Republic's non-proliferation obligations" but does indicate "the State must exercise caution" in placing such details in the public domain.

-- It also finds that the requested blanket ban on the identification of all nuclear experts and witnesses who have had access to sensitive technology "is precisely the kind of witness identification ban that was rejected by the courts even before the Constitution" and notes that the State "has failed to allege any causal link between the act of testifying and the harm to the witnesses."

-- The ruling questions the need for blanket protections of dual-use items since they are publicly advertised and commercially available and since "non-proliferation legislation does not prohibit the mere identification of such dual-use items in the course of legal proceedings." It states "it seems as if such dual-use items are not subject to the same secrecy constraints as those items that are listed on the "trigger lists".

-- The ruling dismisses the State's argument that a blanket *in camera* order would be interlocutory in nature and could subsequently be amended if found to be overly broad, stating that "The open justice principle is a fundamental principle of our law. The starting-point should therefore be that trial proceedings should be held in open court unless there are compelling reasons to close the doors of the court to the media and/or the public." But, the court may subsequently decide to hold certain proceedings behind closed doors if it finds this to be "in the interests of the State, of good order, or of the administration of justice".

-- Finally, the ruling states "it is clear, on the facts

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before me, that the court will have to be cleared at certain stages" and that "the State will be entitled to renew its application on the same papers amplified by such evidence as may be necessary at any stage during the proceedings". It also provides "should counsel for the State feel that (this) cannot be done without disclosing sensitive information or the identity of a particular witness or witnesses I require to be advised accordingly. In that event I will have the court cleared in order to receive the necessary information and argument by all the parties concerned before making my decision."

Media Reaction

¶3. (SBU) Media coverage of the Pretoria High Court ruling was led by wire service reports detailing the decision to reject the requested media ban. These reports appeared on several on-line news outlets and in at least two weekend print publications. Other coverage, including on at least two influential radio stations, featured the judge's caveat that a secrecy order could be imposed during the trial should the evidence warrant. The USG role in supporting the State's failed application did not appear prominently in local coverage of the ruling.

Comment

¶4. (C) It's hard to say who came out on top in this decision. Judge Labuschagne's ruling effectively supports the core arguments on both sides. He clearly upheld the intervening parties' position that the principle of open justice should prevail by dismissing the State's application for blanket *in camera* proceedings. However, Labuschagne accepted all the domestic and international nonproliferation

obligations cited by the State as requiring in camera proceedings and clearly stated that certain aspects of the trial will need to be held in closed court. He also opened the door for the State to present more detailed evidence justifying specific in camera requests by indicating his willingness to hear such evidence in camera.

¶ 15. (C) Undoubtedly, it will entail considerable additional labor for the State to prepare multiple, detailed in camera applications for each witness and set of evidence it wishes to protect. However, the legal framework set out in this ruling indicates the State's chances of success will be high if its individual applications are well researched and documented. If the NPA prosecutors do their homework, the State ultimately may be able to protect every single item it sought to shield under its original blanket in camera application. Thus, the intervening parties may have won the battle over legal principle, but could very well lose the prize they seek -- access to information about how the South African node of the A.Q. Khan network functioned.

¶ 16. (C) There has been no indication that this ruling will change the trial timing previously reported. Neither side appears interested in filing an appeal (unsurprising, since the ruling leaves them hard pressed to find grounds). Introduction of evidence is still scheduled to begin on July 31st. It is unclear from NPA public statements whether they intend to begin by tabling a more specific in camera application, or whether they will begin by leading non-sensitive evidence and witnesses. Mission will continue to observe and report on all open court proceedings.
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